

JESICCA (Migration) [2021] AATA 1182 (15 March 2021)

DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANT:	Ms JESICCA
CASE NUMBER:	2012780
HOME AFFAIRS REFERENCE(S):	BCC2020/586766
MEMBER:	Joanne Bakas
DATE:	15 March 2021
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Statement made on 15 March 2021 at 3:49pm

CATCHWORDS

MIGRATION cancellation – Temporary Skill Shortage (Class GK) visa – Subclass 482 (Temporary Skill Shortage) – member of the family unit – relationship ceased – employment as a carer – Nursing studies disrupted – no family support – financial hardship – decision under review set aside

LEGISLATION

*Migration Act 1958, ss 48, 116
Migration Regulations 1994, Schedule 2, r 2.12*

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision dated 6 August 2020 made by a delegate of the Minister for Home Affairs to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa under s.116 of the *Migration Act 1958* (the Act).
2. The delegate cancelled the visa under s.116(1)(a) on the basis that the applicant was the holder of a secondary visa and the decision to grant that visa was based, wholly or partly, on the existence of a particular fact or circumstance that permitted the grant of the visa and which no longer exists. That particular fact or circumstance was that the applicant was a member of a family unit of the primary visa holder as she was in a genuine and continuing relationship with Mr Charles Beavers, as prescribed by paragraph (2)(a) of regulation 1.12 of the Migration Regulations 1994. The issue in the present case is whether that ground for cancellation is made out, and if so, whether the visa should be cancelled.
3. The applicant appeared before the Tribunal on 9 March 2021 via audio and video conference on MS Teams to give evidence and present arguments. An interpreter was present to assist the applicant as required.
4. The applicant was represented in relation to the review by her registered migration agent. The representative attended the Tribunal hearing.
5. For the following reasons, the Tribunal has concluded that the decision to cancel the applicant's visa should be set aside.

CONSIDERATION OF CLAIMS AND EVIDENCE

6. Under s.116 of the Act, the Minister may cancel a visa if he or she is satisfied that certain grounds specified in that provision are made out. Relevantly, to this case, these include the ground set out in s.116(1)(a). If satisfied that the ground for cancellation is made out, the decision maker must proceed to consider whether the visa should be cancelled, having regard to all the relevant circumstances, which may include matters of government policy.

Does the ground for cancellation exist?

s.116(1)(a) - Fact or Circumstance for visa grant no longer exists

7. A visa may be cancelled under s.116(1)(a) if the Minister is satisfied that the decision to grant the visa was based, wholly or partly, on a particular fact or circumstance that is no longer the case or no longer exists.
8. It is not disputed by the applicant that her relationship with the primary visa holder (Mr Charles Beavers) has ended and as such she no longer meets the definition of a member of the family unit of Mr Beavers, as they no longer have a mutual commitment to a shared life as a married couple.
9. For these reasons, the Tribunal is satisfied that the ground for cancellation in s.116(1)(a) exists. As that ground does not require mandatory cancellation under s.116(3), the Tribunal must proceed to consider whether the visa should be cancelled.

Consideration of discretion

10. There are no matters specified in the Act or Regulations that must be considered in the exercise of this discretion. The Tribunal has had regard to the circumstances of this case, including matters raised by the applicant, and matters in the Department's Procedures Advice Manual (PAM3) 'General visa cancellation powers'.
11. At the hearing the applicant's submissions included:
 - a. She has been in Australia since 2014 at which time she gained employment at Brightwater Care Group as a carer. Her and Mr Beavers' plans were to hope to apply for permanent residence via business sponsorship. Her intention was to build her family and future in Australia with her husband. However, everything fell apart when she learnt of her husband's infidelity with a sex worker (for the past two years) which also caused her concern for her own health.
 - b. She was raised in Indonesia by her grandparents, both of whom recently passed away. She has no relationship with her birth parents and has no siblings in Indonesia. Nor does she have any family in Australia. However, she is very committed to her work as a carer and has developed strong relationships with her employer and clients. She is also currently studying a Diploma in Nursing and if she is not able to complete this course, she would end up having spent a lot of money without any qualification to show for it.
 - c. In addition, her skills are not well sought after in Indonesia as it is not common to put elderly people into care, as family tend to care for them. It is part of her culture to care for the elderly and she would like to apply for permanent residency in her own right. Her employer is very supportive of her. She claims she would find it difficult to go back as she does not have any supports in Indonesia or means to support herself.
 - d. Further, due to COVID, she is concerned about her ability to return to Australia and requested that by cancelling her visa she would be subject to s.48 of the Act which would limit her potential to lodge further visa applications onshore in Australia.
12. The applicant requested justice and a fair assessment and wishes, on compassionate grounds to not have her visa cancelled.
13. The written submissions and documents from the applicant prior to the hearing also included that she first moved to Australia in November 2014 after marrying Mr Beavers in Bali on 18 October 2014. They had an Australian wedding on 11 April 2015. The relationship broke down in 2018 and she decided to live separately in 2019. Due to the separation Mr Beavers decided to move to NSW from WA. Further, she completed a Certificate III in Aged Care in early 2016 and commenced a Diploma of Nursing on 24 February 2020. She also provided an offer of employment from Brightwater Care from 11 February 2019 as a multiskilled care worker.
14. The applicant gave her evidence in an honest and forthright way and the Tribunal accepts the applicant's evidence and submissions as detailed above. The Tribunal considers the visa applicant's particular personal circumstances weigh somewhat in favour of not cancelling the visa including: that her grandparents who raised her in Indonesia have both passed away; she has no relationship with her birth parents and no siblings in Indonesia; she has ongoing work as a carer in Australia and a strong relationship with her employer and clients; and also

that she is currently studying a Diploma of Nursing and will not be able to complete this course should she be required to leave Australia.

The purpose of the visa holder's travel and stay in Australia, whether the visa holder has a compelling need to travel to or remain in Australia

15. The Tribunal notes that the applicant first arrived in Australia in November 2014 and has been granted various visa's during her stays (including a subclass 457 visa granted on 30 January 2017 to 30 January 2021. Most recently, the applicant was granted a Subclass 482 visa on 25 January 2019 as a secondary applicant, with the purpose of her stay in Australia being to live with Mr Beavers (the primary 482 visa holder) as his wife. Her relationship with Mr Beavers is no longer continuing. Accordingly, the purpose of the applicant's stay in Australia has ceased to exist.
16. While the Tribunal accepts the applicant's evidence that the relationship break-up was not her fault and that she tried to make the relationship work, the Tribunal places some weight on the purpose of the applicant's stay in Australia no longer existing. This weighs in favour of cancelling the visa.

The extent of compliance with visa conditions and past and present behaviour of the visa holder towards the department

17. There is no evidence before the Tribunal that the applicant has breached any condition of her visa. Further, there is no evidence of a lack of co-operation with the department. The applicant promptly responded to the notice of intention to cancel her visa. Those matters weigh in her favour to not cancel the visa.

Degree of hardship that may be caused (financial, psychological, emotional or other hardship)

18. The Tribunal accepts the applicant's evidence that if her visa is cancelled, she would lose the fees she has paid up front for her course as well as the opportunity to study in Australia. Further the Tribunal accepts the applicant's evidence that returning to Indonesia may cause some hardship as she has no family support there and that she has not lived in Indonesia for some six years.
19. The Tribunal accepts that the applicant would suffer some hardship if the visa is cancelled given her circumstances and the Tribunal places some weight in the applicant's favour on the hardship that may be caused by cancellation of the visa.

Circumstances in which ground of cancellation arose. If cancellation is being considered because of relationship breakdown, whether the relationship has broken down as a result of family violence.

20. The ground for visa cancellation arose because the visa holder is no longer in a genuine and continuing relationship with the primary visa holder.
21. The applicant's evidence included that the relationship broke down despite her best efforts due to her husband's infidelity over a two year period with a sex worker. While there is no evidence before me from Mr Beavers, the Tribunal accepts the applicant's evidence that the relationship ended due to factors beyond her control.
22. The Tribunal gives this consideration some weight against cancelling the visa.

Whether there would be consequential cancellations under s.140

23. The circumstances of this case are not such that any person's visa would be consequentially cancelled under s.140 of the Act. As such, this is not a relevant consideration to this case.

Whether there are mandatory legal consequences, such as whether cancellation would result in the visa holder being unlawful and liable to detention and removal, or whether detention is a possible consequence of cancellation and if so, for how long, or whether there are provisions in the Act which prevent the person from making a valid visa application without the Minister's intervention

24. In circumstances where the visa is cancelled, the applicant will no longer have suitable visa status to allow them to remain in Australia. She will thus become an unlawful non-citizen liable for detention under s.189 of the Act and removal under s.198 of the Act.
25. The applicant would also be subject to s.48 of the Act which would limit the potential to lodge further visa applications onshore in Australia.
26. As such, the Tribunal gives this consideration a little weight against cancelling the visa.

Whether any international obligations, including non-refoulement, family unity and best interests of the children as a primary consideration, would be breached as a result of the cancellation

27. The Tribunal finds no information before it to indicate that visa cancellation would impact Australia's international obligations or would be in breach of Australia's non-refoulement obligations. As such, the Tribunal attributes some weight in favour of cancelling the visa.

If it's a permanent visa, whether the former visa holder has strong family, business or other ties in Australia

28. As the visa subject to cancellation is not a permanent visa, this is not a relevant consideration to this case

Any other relevant matters

29. There are no other relevant matters evident or raised by the applicant.
30. In considering the circumstances as a whole, the Tribunal is satisfied, on balance, that the factors in favour of not cancelling the visa outweigh those in favour of cancelling the visa. The Tribunal accordingly concludes that the visa should not be cancelled.

DECISION

31. The Tribunal sets aside the decision under review and substitutes a decision not to cancel the applicant's Subclass 482 - Temporary Skill Shortage visa.

Joanne Bakas
Member